R.S. 27:8–3 provides that where the federal, state and local governing bodies all contribute to the construction of highways, the contribution of the state is limited to fifty per cent of the balance of the cost remaining after deducting the amounts paid by the federal government. As noted in the context of the quoted statute, the local governing bodies are authorized to raise the funds for their share of the cost as already provided in R.S. 40:1–1 et seq. This includes the power to borrow money and issue bonds.

The statutes were enacted in 1916, L. 1916, c. 236. (Assembly Bill No. 170). The Statement following the bill stated that the bill was passed to authorize the State to accept federal aid for road work in accordance with the bill then pending in the United States Congress.

Federal law also anticipates contributions of local governing bodies to the costs of construction of the interstate highway system. The definition of state funds in 23 U.S.C.A. section 101(a) includes funds raised by the state or subdivisions thereof and made available for expenditure under the direct control of the state highway department. In 23 U.S.C.A. section 110(a) it is provided that after all the plans for the route and construction are approved an agreement is to be executed by the state highway department and the Secretary of Commerce for the construction and maintenance of the roads. Subsection (b) of section 110 provides that the Secretary of Commerce in executing the agreement may rely upon the representations of the state highway department with regard to the arrangements or agreements made by the state highway department and the appropriate local governing bodies to share in the construction cost.

The municipalities through which the East-West Freeway in Essex County will pass undoubtedly anticipate benefits from the construction of the highway as a depressed highway. The factor that the highway would not be owned or controlled by the municipalities is immaterial in view of the express authority granted to municipalities under the statute to contribute and the accruing benefit to them regardless of the ownership or control.

Sincerely,

DAVID D. FURMAN
Attorney General

July 27, 1960.

HONORABLE EDWARD J. PATTEN
Secretary of State
State House
Trenton, New Jersey

FORMAL OPINION 1960—No. 25

DEAR SECRETARY PATTEN:

You have requested our opinion whether the Secretary of State should accept for filing a Certificate of Corporate Dissolution prepared and submitted pursuant to R.S. 14:13–1 or R.S. 14:13–3 if such Certificate of Dissolution is not accompanied by a certificate signed by the Director of the Division of Taxation certifying that all corporate taxes have been paid.

R.S. 14:13–1 and R.S. 14:13–3 provide two distinct methods for the voluntary dissolution of domestic corporations organized under Title 14 of the Revised Statutes. Resort may be had to R.S. 14:13–3 only if no part of the authorized capital of the corporation has been paid in and if the corporation has not yet begun the business for which it was created. In all other cases a voluntary dissolution may be effected only by complying with the procedure prescribed by R.S. 14:13–1. Under R.S. 14:13–1 the corporation must make a certificate of dissolution, reciting that two-thirds in interest of its stockholders have voted in favor of such dissolution and have consented thereto at a meeting called upon proper notice, or that all of the stockholders have consented in writing to the dissolution without a meeting; the dissolution then takes effect upon the issuance of a dissolution certificate by the Secretary of State. Under R.S. 14:13–3 the incorporators of the dissolving corporation must file in the office of the Secretary of State a certificate reciting that no part of the capital has been paid in and that the business of the corporation has not been begun, and surrendering all rights and franchises; the dissolution takes effect upon the filing of the incorporators' certificate, without the Secretary of State having to issue a certificate of dissolution like that which is a prerequisite to dissolution under R.S. 14:13–1.

R.S. 14:13–2 expressly prohibits the dissolution of any New Jersey corporation unless "all taxes levied upon or assessed against the corporation by this State in accordance with the provisions of chapter 13 of the title Taxation (§ 54:13–1 et seq.) shall have been fully paid, and a certificate to that effect, signed by the state tax commissioner shall have been annexed to and filed with the certificate of dissolution." (By N.J.S.A. 52:27B–51, the director of the Division of Taxation is to perform the duties formerly imposed on the State Tax Commissioner.) It may be noted that R.S. 14:13–2 requires proof of payment only of taxes levied or assessed in accordance with "chapter 13 of the Title Taxation (§ 54:13–1 et seq.)." The most important taxes formerly imposed by chapter 13 of Title 54 were repealed by L. 1945, c. 162, p. 575, § 27, effective January 1, 1946, the same statute which enacted the Corporation Business Tax Act (*L.* 1945, *c.* 162, p. 563, § 1 et seq., N.J.S.A. 54:10A–1). However, the form of L. 1931, c. 341, p. 836, § 1, the statutory antecedent of the provision which is now R.S. 14:13–2 differed in a material respect from the form in which it was re-enacted as part of the Revised Statutes (1937). Prior to its inclusion in the Revision, the statute (*L.* 1931, *c.* 341, p. 836, § 1) required proof of payment of all taxes "levied upon or assessed against such corporation . . . in accordance with the provisions of an act entitled 'An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof,' . . . approved April eighteenth, one thousand eight hundred and eighty-four *and all acts amendatory thereof or supplementary thereto. . . .*" (Emphasis added.) *L.* 1931, *c.* 341, p. 836, § 1; *L.* 1900, *c.* 126, p. 316, § 1. The Act of 1884 was the first corporation tax law enacted in New Jersey except for franchise taxes on certain railroads, and all later corporation tax laws are amendatory thereof or supplementary thereto. See Black, *Taxation in New Jersey* (fifth ed. 1940), § 103a *et seq.* Consequently, *L.* 1931, *c.* 341, p. 836, § 1, prior to its incorporation in the Revised Statutes of 1937, expressly required payment of *all* corporation taxes as a prerequisite to dissolution. The courts have frequently held, "There is a presumption against a legislative intent to effect a change in substance by a revision of the general laws. Mere changes in phraseology, and even the omission of words, do not necessarily overcome the presumption. *The intention to effect a change in substance must be expressed in language excluding a reasonable doubt.*" (Emphasis added.) *Hartman* v. *City of Brigantine*, 42 N.J. Super. 247, 255 (App. Div.

1956), aff'd. 23 N.J. 530 (1957); *Murphy* v. *Zink,* 136 N.J.L. 235, 245 (Sup. Ct. 1947), aff'd. 136 N.J.L. 635 (E. & A. 1948); *In re Hudson County Elections,* 125 N.J.L. 246, 254 (Sup. Ct. 1940). Therefore, R.S. 14:13–2 in its present form must be construed to require that every domestic corporation submit a tax clearance certificate as proof of payment of *all* corporation taxes levied or assessed against it as a prerequisite to dissolution "by its stockholders." See *American Woolen Co.* v. *Edwards,* 90 N.J.L. 69 (Sup. Ct. 1916), aff'd. 90 N.J.L. 293 (E. & A. 1917). See also N.J.S.A. 54:50–11, 54:10A–12 and 54:10B–12.

However, the question remains whether the Secretary of State may accept for filing a Certificate of Dissolution prepared and submitted by incorporators pursuant to R.S. 14:13–3 (rather than R.S. 14:13–1) if it is not accompanied by a Tax Clearance Certificate. In determining this question it should be noted that a corporation eligible to dissolve under that provision of the statute, that is, a corporation none of whose authorized capital has yet been paid in and which has not yet begun business, may be liable for corporation taxes. Most New Jersey corporations are subject to the taxes imposed by the Corporation Business Tax Act, N.J.S.A. 54:10A–1 et seq. That act imposes an annual franchise tax upon every domestic corporation for the "privilege of having or exercising its corporate franchise in this State." N.J.S.A. 54:10A–2. A domestic corporation organized under Title 14 of the Revised Statutes acquires that privilege, and thus becomes liable for a tax, from the date of the filing and recording of its certificate of incorporation since R.S. 14:2–4 provides that the incorporators, their "successors and assigns, shall, from the date of filing and recording with the Secretary of State, be a body corporate by the name set forth in the certificate subject to dissolution as hereinafter provided," regardless of whether capital has been paid in or whether the corporation commences the business for which it was created. See *Vanneman* v. *Young,* 52 N.J.L. 403 (E. & A. 1899); *Dill on N. J. Corporations,* Section 10, page 46 (5th Edition, 1911). Moreover, there is now an increased likelihood that a corporation seeking to dissolve pursuant to R.S. 14:13–3 will owe a tax. The Corporation Business Tax Act, as originally adopted, provided expressly that, "in the case of any corporation which organizes or qualifies on or after January 1 in any year, no tax shall be payable in such privilege year." *L.* 1945, *c.* 162, p. 571, § 13. But when the Act was amended by *L.* 1958, *c.* 63, p. 185 to include an additional tax measured by income, the quoted provision was omitted. *L.* 1958, *c.* 63, p. 195, § 6. Consequently a corporation subject to the Business Corporation Tax Act becomes liable for taxes thereunder as soon as its certificate of incorporation is filed. See N.J.S.A. 54:10A–17; Cf. *Culkin* v. *Hillside Restaurant, Inc.,* 126 N.J. Eq. 96 (Ch. 1939).

Despite the possibility that a corporation seeking to dissolve pursuant to R.S. 14:13–3 may owe unpaid taxes, two reasons have been suggested why that section, unlike R.S. 14:13–1, does not require submission of a tax clearance certificate for dissolution thereunder. First, it is argued that R.S. 14:13–2 refers to "the certificate of dissolution" to which the tax clearance certificate shall be annexed and that, since R.S. 14:13–1, unlike R.S. 14:13–3, also expressly refers to a "certificate of dissolution," R.S. 14:13–2 was intended to apply to cases of dissolution pursuant to the former statute, but not to the latter. However, although R.S. 14:13–3 does not expressly refer to the phrase "certificate of dissolution," it does require the incorporators to file a certificate which has the effect of dissolving the corporation; certainly this can aptly be described as a certificate of dissolution. Parenthetically, it may be noted that the numerical arrangement of the three sections referred to in the Revised Statutes

is of no significance since R.S. 14:13–2 was enacted as a separate statute and was therefore presumably intended to apply to all dissolutions which may reasonably be comprehended within its terms. R.S. 1:1–5; *Asbury Park Press* v. *City of Asbury Park,* 19 N.J. 183 (1955); *In re J.W.,* 44 N.J. Super. 216, 224 (App. Div. 1957).

The second objection is that R.S. 14:13–2, like R.S. 54:50–11, N.J.S.A. 54:10A–12 and N.J.S.A. 54:10B–12, make the obtaining of a tax clearance certificate a prerequisite for dissolution of a corporation by its *stockholders,* but not, expressly at least, by its incorporators. It should be noted, however, that R.S. 54:50–11, N.J.S.A. 54:10A–12 and N.J.S.A. 54:10B–12 supplement R. S. 14:13–2 and prohibit any dissolutions "by the action of the stockholders or by the decree of any court" unless all taxes are paid. These statutes are clearly intended to comprehend all types of dissolutions by referring specifically to the two generic subclasses, i.e., voluntary dissolution by act of the corporation itself and dissolution through court action. Similarly, the reference in R.S. 14:13–2 to dissolutions by "stockholders" should be construed to apply to all voluntary dissolutions. There is no reason why a corporation dissolved by its incorporators should be exempt from the requirement of obtaining a tax clearance certificate when that requirement is imposed on all other voluntary dissolutions. Consequently, the term "stockholders" in R.S. 14:13–3, R.S. 54:50–11 and N.J.S.A. 54:10A–12 and 54:10B–12 must be construed to include "incorporators" within the meaning of R.S. 14:13–3. In *Storage Co.* v. *Assessors,* 56 N.J.L. 389, 392 (Sup. Ct. 1894), a case construing the former capital stock tax, the court said, "The General Corporation Act, under which this company was organized, treats the persons named in the certificate as the stockholders who hold the shares of the company's capital stock, and throughout the act persons who have become subscribers for stock are regarded as stockholders." To the same effect, see *Burke* v. *Walker,* 124 N.J. Eq. 141, 145 (Ch. 1938), cf. *Biechowski* v. *Matarese,* 54 N.J. Super. 333, 343 (App. Div. 1959).

The cited statutes expressly direct that "no certificate of dissolution or withdrawal shall be issued by the Secretary of State and no Certificate of Merger shall be filed with him" unless a tax clearance certificate is filed. The statutes do not, however, expressly prohibit the Secretary of State from filing a certificate of dissolution prepared by the incorporators pursuant to R.S. 14:13–3. But such a prohibition is the necessary implication of the statutes previously referred to. Since no corporation may be dissolved unless all of its taxes have been paid, the Secretary of State should not permit a corporation to effect a dissolution by filing its certificate unless he is satisfied that the taxes have been paid. See *Texas Co.* v. *Dickinson,* 79 N.J.L. 292 (Sup. Ct. 1910). Since a tax clearance certificate is the most satisfactory proof that taxes have been paid, the Secretary should not accept a certificate of dissolution for filing unless it has annexed thereto such a tax clearance certificate.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MURRY BROCHIN
Deputy Attorney General